(3)

No. 91-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. MCCORMICK,
Petitioner,

v.

AT&T TECHNOLOGIES, INC. and CAMERON ALLEN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL M. THOMPSON
MARTIN J. BARRINGTON
MARGUERITE R. RUBY
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-8516

Of Counsel:
JOSEPH RAMIREZ
ROBERT W. BENSON

REX E. LEE *
DAVID W. CARPENTER
THOMAS W. MERRILL
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7237

Attorneys for Respondents AT&T Technologies, Inc. and Cameron Allen

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals properly determined that petitioner's state law claims—arising out of his employer's treatment of a work locker on its premises—could not be resolved without interpreting the applicable collective bargaining agreement and therefore had to be treated as claims arising under § 301 of the Labor Management Relations Act?

STATEMENT REQUIRED BY RULE 29.1

AT&T Technologies, Inc. was merged into the American Telephone and Telegraph Company ("AT&T"), effective December 31, 1989. AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the following companies that have publicly-traded securities: Compagnie Industriali Riunite S.P.A., AT&T Capital Corporation, and AT&T Credit Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

No. 91-515

WILLIAM T. MCCORMICK,
Petitioner,

v.

AT&T TECHNOLOGIES, INC. and CAMERON ALLEN,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case presents neither the questions nor the conflicts that the Petition alleges. A former bargaining unit employee of AT&T here claims that AT&T committed Virginia state law torts of conversion, negligence, and intentional or negligent infliction of emotional distress by entering a work locker and disposing of materials left there after the employee abandoned his job. The Fourth Circuit held that these claims "required interpretation of the applicable collective bargaining agreement" (Pet. App. 6a-7a, 10a), and thus that they had to be treated as arising under § 301 of the Labor Management Relations Act ("LMRA") under a long line of decisions of this Court.

There is no conflict in the courts of appeals over the applicable legal standard. Nor is there even a conflict in the courts of appeals over the manner in which this legal standard is to be applied to claims like petitioner's. Petitioner argues otherwise by misstating both the Fourth Circuit's holding and the holdings of other courts of appeals.

1. Petitioner William T. McCormick is a former bargaining unit employee of respondent AT&T Technologies, Inc. ("AT&T"). The terms and conditions of petitioner's employment, and AT&T's rights and obligations, were

governed by a collective bargaining agreement between AT&T and the Communications Workers of America. This collective bargaining agreement applied to all AT&T bargaining unit employees in several states, including Virginia. Pet. App. 13a.

This labor contract states that AT&T has the exclusive "right to manage the business and to direct the working forces and operations of the same, subject to the limitations of this Agreement." C.A. App. 41. The labor contract, and an attendant letter agreement, also require AT&T to act with "responsibility and respect" for the benefit of its employees and to act with "respect, integrity [and] trust" to serve the employees' interests. C.A. App. 45-46.

The labor contract further establishes a broad grievance procedure covering employee disputes "arising with respect to wages, hours of work and other conditions of employment." C.A. App. 42. With certain limited exceptions not relevant here, the contract provides for final and binding arbitration of "[a]ny dispute arising between the UNION and the COMPANY with respect to the interpretation of any provision of this Agreement or the performance of any obligation hereunder." C.A. App. 42, 44.

2. On September 11, 1986, petitioner left work early, claiming to be ill. In the ensuing weeks, AT&T made repeated attempts to contact petitioner about his medical and employment status. Each was unsuccessful. On September 26, AT&T notified petitioner that his employment would be terminated if he did not report to work by September 30. When petitioner failed to do so, AT&T terminated his employment by letter dated October 1, 1986.

Petitioner previously had been provided a work locker as a condition of his employment. Because petitioner had abandoned his job, his supervisor, respondent Cameron Allen, entered the locker with a Company passkey on

October 2, 1986. Allen recovered Company-owned tools and cleaned out the locker so it could be used by another employee. In so doing, Allen discarded items from the locker that appeared to be trash.

Later that day, a Union shop steward complained to both Allen and her supervisor about Allen's handling of the work locker. The shop steward stated that some of petitioner's co-workers had found a personal letter to petitioner in the trash and complained that Allen should not have entered and cleaned out the locker without the presence of a Union representative.

On October 3, 1986, petitioner returned to AT&T. During a meeting in which he was represented by a Union steward, petitioner was reinstated. In that meeting, both petitioner and his Union representative discussed Allen's entry into petitioner's locker.

Later on October 3, petitioner walked off the job and never returned. AT&T terminated his employment for job abandonment effective October 3. Petitioner never filed a grievance about either his termination or AT&T's actions with respect to his work locker, although the labor contract authorized such grievances.

3. Fourteen months after his termination, petitioner commenced this action in Virginia state court. He alleged that, by entering the Company locker without authorization and handling the contents of the locker, respondents committed torts of intentional and negligent infliction of emotional distress, conversion, and negligence. As the crux of each of these claims, petitioner alleged that respondents did not have "permission" or "legal authority" to enter and clean out his work locker and that, by doing so, respondents violated numerous duties they owed to petitioner.

Specifically, petitioner's complaint alleged that respondents had violated a number of related "duties": "to hold for a reasonable amount of time" the contents of his work

locker; to "return or make available to [petitioner]" the contents of his locker; to "restrict . . . access" to the contents of the locker; and "to not conduct themselves in such a manner" that would likely cause petitioner emotional distress. C.A. App. 9-10. By violating these asserted duties in its allegedly unauthorized treatment of his work locker, petitioner claimed that respondents' conduct was "negligent," "reckless," and "outrageous and intolerable." C.A. App. 10-11.

4. Respondents removed the action to federal court on the ground that petitioner's claims had to be treated as arising under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Respondents then moved for summary judgment because, *inter alia*, petitioner's claims were barred by the applicable statute of limitations under § 301. Petitioner moved to remand the action to state court.

The district court (Judge Robert R. Merhige, Jr.) denied petitioner's motion to remand and granted summary judgment to respondents. The court found that the gravamen of petitioner's complaint concerned the propriety of respondents' actions in entering and cleaning out his Company locker. Pet. App. 36a. The complaint therefore concerned "conditions of employment governed by a collective bargaining agreement." Pet. App. 39a. Because the state law claims petitioner asserted relied upon duties defined by the labor contract, the district court held that they were completely preempted by § 301 and properly removed to federal court. Pet. App. 38a.

5. The United States Court of Appeals for the Fourth Circuit, sitting *en banc*, affirmed.[1] Applying this Court's decisions in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987); *Caterpillar Inc.* v. *Williams*, 482 U.S. 386

[1] The case initially was briefed and argued to a three-judge panel, but the Fourth Circuit decided to hear it *en banc* before the panel issued an opinion.

(1987); and *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Fourth Circuit held that petitioner's claims were completely preempted because resolution of those claims necessarily would require interpretation of the labor contract. Pet. App. 6a-7a, 10a.

In reaching its decision, the Fourth Circuit carefully analyzed the elements of each of petitioner's claims and the labor contract provisions that related to them. Pet. App. 6a-7a. The court noted that Virginia law requires that an actor's conduct be "outrageous and intolerable" in order to establish a claim for intentional infliction of emotional distress, and that "[i]f management's actions in disposing of the contents of [petitioner's] locker were authorized under the collective bargaining agreement, those actions could not simultaneously be considered 'outrageous and intolerable' under Virginia law." Pet. App. 10a. Similarly, the court found that "each of the other charges require[s] recourse to the agreement to determine whether the alleged conduct was 'negligent' or 'wrongful.'" Pet. App. 11a. The court noted that it was petitioner's burden to prove wrongfulness under Virginia law. Pet. App. 7a.

Contrary to petitioner's misstatement, the court of appeals did not hold that petitioner's claims were preempted by § 301 because they "*could* be defended" on the ground that the labor contract authorized respondents' conduct. Pet. 5 (emphasis in Petition). Similarly, contrary to petitioner's misstatement (Pet. 11), respondents never argued that this case was preempted on the basis of any employer defense, and the majority opinion never referred to any employer defense. Instead, the court of appeals concluded:

> State tort claims are preempted where reference to a collective bargaining agreement is necessary to determine whether a "duty of care" exists or to define "the nature and scope of that duty. . . ." *Hechler*, 481 U.S. at 862. Whether the actions of management

> personnel in disposing of the contents of [petitioner's] locker were in any way wrongful simply cannot be determined without examining the collective bargaining agreement to ascertain the extent of any duty [respondents] may have owed him.

Pet. App. 8a, 10a.

Judge Phillips, joined by two other judges, dissented. After a lengthy review of this Court's decisions, Judge Phillips argued that the majority had "gotten off the track" by "looking beyond [petitioner's] claims to the merits of [respondents'] § 301 preemption positions" to determine whether petitioner's claims were completely preempted (Pet. App. 26a). The dissent then independently reviewed the allegations of petitioner's complaint, and concluded that the complaint should be construed as grounding the duties allegedly violated by respondents "in an independent source, Virginia tort law," rather than, as the majority had concluded, in the labor contract (Pet. App. 28a).

REASONS FOR DENYING THE WRIT

This case involves nothing more than a dispute over the application of settled legal principles to a specific and rather unusual set of facts. In holding that petitioner's claims are preempted by § 301 of the LMRA, the Fourth Circuit applied the standard set forth in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987); *Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987); and *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). The Fourth Circuit held that petitioner's state law claims, by their necessary terms, "depend on the meaning of a collective bargaining agreement" and thus must be treated as arising under § 301 *quite apart from* any defense respondents would have. *Lingle*, 486 U.S. at 406; *see Caterpillar*, 482 U.S. at 398-99; *Lueck*, 471 U.S. at 213; *Hechler*, 481 U.S. at 858; Pet. App. 6a-7a, 10a.

This routine application of settled principles would not present any issues appropriate for review by this Court even if the narrow holding were incorrect—as it assuredly is not. Indeed, the only way petitioner can argue otherwise is by misstating the Fourth Circuit's holding and the decisions of other courts of appeals. In particular, petitioner maintains that the Fourth Circuit adopted two propositions over which the courts of appeals are said to be divided: (1) that state law claims can be completely preempted under § 301, and hence removed to federal court, based on a defense asserted by an employer that requires an interpretation of a labor contract; and (2) that intentional infliction of emotional distress claims are preempted under § 301 whenever they involve workplace behavior.

However, the Fourth Circuit did not—and could not—adopt either of these propositions. Further, there is no conflict among the courts of appeals on either of these issues.

I. NEITHER THE FOURTH CIRCUIT NOR ANY COURT OF APPEALS HAS HELD THAT AN EMPLOYER'S DEFENSES MAY ESTABLISH COMPLETE PREEMPTION UNDER SECTION 301.

Petitioner asserts that the courts of appeals are in "hopeless conflict" (Pet. 8) about whether complete preemption under § 301 may be predicated on an employer defense that requires interpretation of a labor contract. The alleged "conflict" is wholly manufactured. There is no disagreement among the courts of appeals on this issue. Nor could there be because this Court squarely held in *Caterpillar* that employer defenses may *not* be the basis of complete preemption under § 301. *Caterpillar*, 482 U.S. at 398-99.

A. There Is No Conflict Among The Circuits on Preemption by Employer Defenses.

In seeking to manufacture a conflict, petitioner has mischaracterized decisions of the First, Eighth, and Ninth Circuits. These decisions do not hold that § 301 preemption can be based on a defense that requires interpretation of a labor contract.

To the contrary, these circuits recognize, as required by *Caterpillar*, that complete preemption applies only when resolution of a *plaintiff's* state law claim depends upon interpretation of the labor contract. *See Magerer* v. *John Sexton & Co.*, 912 F.2d 525, 530 (1st Cir. 1990) ("resolution of plaintiff's statutory retaliatory discharge *claim* depends on an interpretation of the collective bargaining agreement" because state law created a negotiable standard) (emphasis added); *Utility Workers of America* v. *Southern California Edison Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) (plaintiff's "constitutional *claims* are 'substantially dependent' upon the analysis of the collective bargaining agreement" to determine whether drug testing constituted unreasonable search and seizure) (emphasis added).[2]

---

[2] Neither *Magerer* nor *Utility Workers* even addresses the possibility that preemption could be based on an employer *defense*. The Eighth Circuit's 1988 decision in *Hanks I* raised the *possibility* that a claim could be preempted based on an employer's affirmative defense. *Hanks* v. *General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988). It did so, however, in the context of a case where removal jurisdiction was independently based on diversity of citizenship. If a federal court has an independent basis for jurisdiction such as diversity, then, of course, it must resolve the dispute on the merits—including any employer defenses grounded in § 301 preemption. *See Caterpillar*, 482 U.S. at 397, 398 n.13; Pet. App. 29a. Thus, the complete preemption rule of *Caterpillar*, *supra*—requiring that the court focus only on whether the plaintiff's claims require interpretation of a labor agreement—did not apply in *Hanks*. *See also Hanks II*, 906 F.2d 341, 344 (8th Cir. 1990) (reviewing both the employee claims and employer defenses when the case returned after remand). In *Johnson* v. *Anheuser Busch, Inc.*, 876 F.2d 620, 623 (8th Cir. 1989), the court quoted the language in *Hanks I* in a case where

Similarly, although the Petition cites decisions in which § 301 preemption was denied, none demonstrates a conflict on the question whether preemption may be based on a defense. Rather, they represent application of the same preemption standard to specific claims whose resolution did not require reference to the labor contract. *See Smolarek* v. *Chrysler Corp.*, 879 F.2d 1326, 1332 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 539 (1989) (resolution of plaintiff's handicap discrimination *claim* did not require reference to labor contract); *Local No. 57* v. *Bechtel Power Corp.*, 834 F.2d 884, 886 (10th Cir.), *cert. denied*, 486 U.S. 1055 (1988) (resolution of plaintiff's *claims* under Utah blacklisting statute did not require reference to labor contract).

Petitioner seeks to bolster his assertion that there is a conflict by relying upon a statement to that effect in the dissenting opinion below (Pet. 8). But although the dissenting opinion stated that its disagreement with the majority "reflects a wider inter-circuit conflict on this issue that has developed in recent years" (Pet. App. 14a), the *only* decisions cited by the dissent in support of an inter-circuit conflict involved the application of this Court's preemption standard to various claims for intentional infliction of emotional distress. Pet. App. 29a n.4. Neither the dissenting opinion nor the Petition cites a single court of appeals decision decided after *Caterpillar* holding that employer defenses may be relied upon as a basis for finding complete preemption under § 301.

B. This Court Definitively Resolved The Employer Defense Issue In *Caterpillar*.

The absence of a circuit conflict is hardly surprising, given that this Court definitively resolved the issue in

---

removal was based on complete preemption. But the court did not examine any employer defenses in determining whether the claims were completely preempted, and it does not appear from the opinion that the question whether employer defenses could be considered was at issue.

1987. In its unanimous opinion in *Caterpillar*, *supra*, the Court stated:

> Caterpillar argues that § 301 pre-empts a state-law claim *even when the employer raises only a defense* that requires a court to interpret or apply a collective bargaining agreement. . . . But the presence of a federal question, even a § 301 question, in a defensive argument *does not* overcome the paramount policies embodied in the well-pleaded complaint rule. . . . [A] defendant *cannot*, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.

482 U.S. at 398-99 (emphases altered from original). A plainer resolution of this issue cannot be imagined. Indeed, petitioner concedes that the employer defense issue was "directly raised" in *Caterpillar* "and the Court was equally direct in answering." Pet. 13.

Nonetheless, petitioner also incongruously suggests that "one passage" in the Court's subsequent decision in *Lingle* "could be read to suggest" that the issue is still open. Pet. 14. That passage describes various factual issues presented by the state law claim in that case and then concludes:

> Thus, the state-law remedy in this case is "independent" of the collective bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective bargaining agreement.

486 U.S. at 407, quoted at Pet. 14. Petitioner does not explain how this sentence could possibly be read as overruling the unanimous decision in *Caterpillar* one year earlier, especially when *Caterpillar* was cited with approval by *Lingle*. *See* 486 U.S. at 410 n.10. Indeed, petitioner hastens to disclaim any such reading, as-

serting that "[t]here is . . . *no* indication that *Lingle* intended so casually to overrule *Caterpillar* on a question directly raised and decided *only* in the earlier case." Pet. 14 (emphases in Petition).

What is obvious to petitioner is also obvious to the courts of appeals. Although petitioner, like the dissenting opinion (Pet. App. 24a n.2), refers cryptically to "confusion sowed by the courts of appeals' various readings of *Lingle*" (Pet. 16), neither the Petition nor the dissenting opinion cites a *single* court of appeals decision that has read *Lingle* as qualifying the express holding of *Caterpillar*.[3] Petitioner's suggestion that there is widespread confusion in the lower courts is created out of whole cloth.

C. The Fourth Circuit Never Considered Or Ruled On Any Employer Defense.

Even if there were a conflict on this question, it would be irrelevant to the decision here. The Fourth Circuit never even *mentioned* any defenses AT&T might raise to petitioner's claims, let alone ruled that petitioner's claims were preempted because of any defense. Instead, the Fourth Circuit's analysis correctly followed the clear mandate provided by this Court's decisions in *Lueck*, *Caterpillar*, *Hechler*, and *Lingle*. The Fourth Circuit held that petitioner's state law claims were preempted because his claims for relief necessarily depended on duties created and defined by the labor contract. Pet.

---

[3] To the contrary, the lower courts have clearly recognized that *Lingle* does not qualify *Caterpillar*. For example, in *Stikes* v. *Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2015 (1991), the plaintiff argued, as petitioner does here, that the Ninth Circuit's preemption test ignored the requirements of *Caterpillar*. In rejecting this argument, the Ninth Circuit explained that, unlike the contract interpretation issue in *Caterpillar*, which was raised by the employer's defense, the contract construction issue there was "part and parcel of the prima facie claim itself, subjecting that claim to federal jurisdiction." *Id.* at 1270.

App. 8a, 10a. Because the Fourth Circuit did not rule that a labor contract defense is a proper basis for preemption, there is no basis to grant review to consider that issue.

II. THERE IS NO CIRCUIT CONFLICT OR CONFUSION ABOUT THE STANDARD FOR ASSESSING CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Petitioner also urges that this Court grant certiorari to resolve an alleged "multi-faceted circuit conflict" (Pet. 17) over whether claims of intentional infliction of emotional distress are preempted by § 301 "whenever the actions complained of involve workplace behavior by the employer or an agent of the employer." Pet. i. Again, petitioner has created a spurious conflict on an issue not presented by the decision below.

A. There Is No Circuit Conflict On Whether Intentional Infliction Claims Are Preempted Whenever Workplace Behavior Is Involved.

Contrary to petitioner's assertion, no circuit has held that intentional infliction claims are necessarily preempted by § 301 *whenever* they involve "workplace behavior" or the "manner of discipline or discharge." Pet. i, 10. Instead, the lower courts have engaged in a case-by-case application of the standard established by this Court's cases to determine whether resolution of each particular claim of intentional infliction of emotional distress requires interpretation of the applicable labor contract. Labor contracts frequently address "workplace behavior," discipline, and discharge. Consequently, it is hardly surprising that intentional infliction claims related to these areas frequently are held to be preempted when, as here, resolution of the claims requires interpretation of labor contract provisions. But no court, including the Fourth Circuit below, has adopted a *per se*

rule to the effect that all intentional infliction claims are preempted whenever they involve workplace behavior.

The dissenting opinion observed that some courts of appeals have found intentional infliction claims preempted and others have held that such claims are not preempted. Pet. App. 29a n.4. But this is the inevitable consequence of any regime requiring courts to apply a general legal standard to widely disparate fact situations and labor contracts. Although individual judges may disagree about the proper application of that standard in specific circumstances—as they did here—this does not mean that there is any disagreement about the relevant standard.[4]

Petitioner quotes statements from various courts of appeals that use slightly different words in describing the relevant inquiry in determining whether intentional infliction claims are preempted by § 301. Pet. 18-23. Petitioner notes that the Third Circuit has said the ques-

---

[4] Moreover, although there will always be disagreements about how a standard should be applied to particular facts—especially in unusual cases like the present one—it does not follow that recurring patterns will not emerge over time. For example, intentional infliction claims that require the court to interpret the discipline and discharge provisions of the labor contract generally have been held to be preempted. *See, e.g., Brown* v. *Southwestern Bell Telephone Co.*, 901 F.2d 1250 (5th Cir. 1990); *Douglas* v. *American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989); *Harris* v. *Alumax Mill Products, Inc.*, 807 F.2d 400 (9th Cir.), *cert. denied*, 111 S. Ct. 102 (1990); *Johnson* v. *Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990). On the other hand, intentional infliction claims based on allegations of personal harassment that do not require an analysis of any labor contract provisions generally have been held not to be preempted. *See, e.g., Krashna* v. *Oliver Realty, Inc.*, 895 F.2d 111 (3d Cir. 1990) (claims regarding harassing comments and actions); *Fox* v. *Parker Hannifan Corp.*, 914 F.2d 795 (6th Cir. 1990) (claims based on harassment, not underlying discharge); *Keehr* v. *Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1977) (claim based on personal, racially derogatory comment).

tion is whether such claims are "clearly outside the scope of the collective bargaining agreement," *Krashna* v. *Oliver Realty, Inc.*, 895 F.2d 111, 114 (3d Cir. 1990); the Sixth Circuit has framed the question as whether the employer "could have tortiously caused [plaintiff's] emotional distress without violating the contract," *O'Shea* v. *Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989); the Ninth Circuit's characterization is whether "[t]he collective bargaining agreement does not envision such behavior," *Tellez* v. *Pacific Gas & Electric Co.*, 817 F.2d 536, 539 (9th Cir.), *cert. denied*, 484 U.S. 908 (1987); and the Seventh Circuit has said the question is whether the "claim consists of allegedly wrongful acts directly related to the terms and conditions of [plaintiff's] employment." *Douglas* v. *American Information Technologies Corp.*, 877 F.2d 565, 572 n.10 (7th Cir. 1989).

But the slight variations in these verbal formulas do not indicate tnat the courts are applying different legal standards. To the contrary, they are simply alternative ways of expressing the same idea: that intentional infliction claims will be preempted if they require a court to interpret a labor agreement. Petitioner cannot show that any of the cited cases would have been decided differently if the verbal formula of one circuit rather than another had been applied, or indeed that the present case would have been decided differently if the formula of any other circuit had been applied.[5]

---

[5] Petitioner notes (Pet. 20) that the Eighth Circuit in a footnote in *Hanks II* disagreed with a portion of the Ninth Circuit's analysis in *Miller* v. *AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988), but he omits some critical language from the Eighth Circuit's footnote. The Eighth Circuit said: "Inasmuch as the opinion of the Ninth Circuit in *Miller* v. *AT&T Network* [*Systems*], 850 F.2d 543 (9th Cir. 1988), would suggest a result different from the one indicated by the [*United Steelworkers of America* v.] *Rawson*, [110 S. Ct. 1904, 1910 (1990)] dicta, we disagree." 906 F.2d at 344 n.4. The issue raised by the "*Rawson* dicta"—whether there is no preemption under § 301 if the defendant has violated a general duty

B. The Issue Whether Intentional Infliction Claims Are Preempted Whenever They Involve Workplace Behavior Is Not Presented In This Case.

Even if there were a conflict among the circuits regarding the proper treatment of intentional infliction cases, the issue presented by petitioner could not be resolved in this case. The Fourth Circuit did not hold that intentional infliction claims are preempted *whenever* they involve workplace behavior. *Compare* Pet. i. Rather, it decided a much more limited issue: whether a bargaining unit employee's intentional infliction claim alleging unauthorized entry and cleaning out of his work locker (the issuance of which was a condition of his employment) was preempted by § 301 when it would be necessary to interpret the applicable labor contract to resolve the claim. Because the broader question presented by the Petition was not addressed or ruled on by the Fourth Circuit, it may not serve as a basis for granting the writ.

---

owed to all citizens—is different from the issue petitioner presents here. In any event, the Ninth Circuit should be allowed to respond to this Court's decision in *Rawson*, which was handed down after the Ninth Circuit's decision in *Miller*, before concluding that the Ninth Circuit and the Eighth Circuit are in disagreement about the proper reading of that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL M. THOMPSON
MARTIN J. BARRINGTON
MARGUERITE R. RUBY
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-8516

Of Counsel:
JOSEPH RAMIREZ
ROBERT W. BENSON

REX E. LEE *
DAVID W. CARPENTER
THOMAS W. MERRILL
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7237

Attorneys for Respondents AT&T Technologies, Inc. and Cameron Allen

* *Counsel of Record*

November 1991